United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: August 11, 2005

REVISED

TO : Stephen Glasser, Regional Director
Region 7

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Local 79, Service Employees International
Union, AFL-CIO (MediLodge Group) 593-2025-2000
Cases 7-CA-48711, 48713, 48714, 48761 593-2025-4000
Cases 7-CG-45, 46, 47, 48 593-2075
Cases 7-CG-49, 50, 51, 52 593-4042

This case was submitted for advice on several 8(g) and 8(a)(1) and (3) issues arising out of the Employer's discharge of nearly half its unionized workforce for failing to arrive at work one day by 7 a.m., where the Employer had specially designated the arrival time in anticipation of a strike but where the Union had canceled the strike the previous day. The issues are: (1) Did the employees engage in a strike or work stoppage by failing to arrive at work by 7 a.m.? (2) Did the Union violate the 10-day notice provision of Section 8(g) by giving the Employer only 233.5 hours strike notice as opposed to 240 hours? and (3) Did the Union violate Section 8(g) by failing to give the Employer notice of its intent to picket the Employer to protest the discharges?

We conclude that the employees who did not arrive to work by 7 a.m. were not engaged in a strike or work stoppage because they had no intent to withhold their labor from the Employer. Moreover, even assuming the employees were strikers, the Union provided the required 10-day strike notice. Accordingly, the Employer violated Section 8(a)(1) and (3) by discharging the employees for purportedly engaging in an unlawful strike. Finally, we conclude that the Board should reconsider prior precedent and find that the Union violated Section 8(g) by failing to provide notice of its picketing to protest the discharges even though the picketers were protesting serious unfair labor practices.

FACTS

The Union represents employees at four of the Employer's nursing facilities in Royal Oak, Southfield, Rochester Hills, and Bloomfield Hills, Michigan. The collective bargaining agreements at those facilities expired in November 2004, and the parties have been bargaining unsuccessfully for new agreements.

On June 14, 2005, the Union sent strike notices by facsimile to each of the four facilities. The faxes arrived between 1:35 p.m. and 1:38 p.m. and stated that a 24-hour strike would commence at 7 a.m. on June 24.

A week later, the Employer posted strike schedule notices, which stated that all employees were required to report to work at 7 a.m. on June 24 to ensure full staffing and that no absences would be excused. The notice continued, "[s]hould you fail to report to work you will be considered on strike." The Employer reiterated this message at voluntary meetings held throughout the week.

At about 5 p.m. on the day before the scheduled strike, the Union lead negotiator, Wendell Stone, called the Employer's director of operations and told her that he would call off the strike if the Employer agreed to bargain the next day. The Employer's attorney then called the Union and accepted the offer, requesting confirmation in writing. Stone informed the Employer that the Union would attempt to contact as many employees as possible to tell them the Union had canceled the strike. The Employer's attorney reminded Stone that all employees should still report to work at 7 a.m. the next morning. Stone asked for assurances that the Employer would not discipline employees for failing to arrive by 7 a.m. The Employer did not directly respond. The Union faxed a strike cancellation notice to the Employer later that evening.

After the conversation, Stone called the Union business agents, told them the strike was canceled, and instructed them to call unit employees and post notices in the facilities indicating that the Union had canceled the strike. Stone did not specify to the business agents that all employees should report at 7 a.m. the following day. It also does not appear that the Employer told employees, on the evening of June 23, that they were still to report to work at 7 a.m. Stone dispatched his business agents to the facilities to meet employees on June 24 before 7 a.m.

Over 200 employees, almost half of them, did not arrive by 7 a.m. on June 24 and were immediately discharged.[1] Several employees attempted to enter the building shortly after 7 a.m. and throughout the day, but the Employer denied them entry. All discharged employees received the same letter, stating:

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[1] In its position statement, the Employer acknowledges that the majority of employees who did not arrive by 7 a.m. worked the afternoon shift.

> You engaged in an unprotected and unlawful strike. Therefore, your employment with MediLodge is terminated effective immediately . . . . Should the National Labor Relations Board, in a final order enforced by a court of competent jurisdiction, determine your status was protected you have been permanently replaced. If and only if such a finding is made, you may be recalled to work as positions with MediLodge become available.

On June 27, the Union held a meeting with the discharged employees, where it advised them to stand in front of their buildings, protest their discharges, and demand their jobs back. The attorney instructed employees not to call on current employees to join them or to encourage a work stoppage.

On June 28, picketing began at all four facilities and is ongoing. The number of picketers at each facilities has varied between ten and 60. The picketers have carried placards stating, "We Want Our Jobs Back," "Unfair Labor Practices," and "Locked Out." The picketers have consisted mostly of employees discharged on June 24 and have not included active employees. The Union admits that it served no notice to the Employer of the June 28 picketing.

ACTION

The Region should, absent withdrawal, dismiss the Section 8(g) charge as to the timeliness of the June 24 strike notice, and, absent settlement, issue complaint on the 8(a)(1) and (3) discharges. The employees who failed to arrive at work by 7 a.m. were not on strike and, even if they were, the Union's 8(g) strike notice was adequate. Thus, the Employer violated Section 8(a)(1) and (3) by unlawfully discharging the employees for purportedly engaging in an unlawful strike. [*FOIA Exemption 5*

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1. Employees who did not arrive for work by 7 a.m. were not on strike.

A strike is an intentional, concerted effort of employees to pressure an employer to effectuate change through a work stoppage or interruption.[3]

Here, the evidence demonstrates that the employees who did not arrive by 7 a.m., e.g., because they were reporting at their normal work times, had no intent to engage in a work stoppage. Rather, employees did not realize that they were supposed to report at 7 a.m. notwithstanding the strike's cancellation. Stone [*FOIA Exemptions 6 and 7(c)*] failed to inform his business representatives to tell employees that the Employer still expected them to arrive at work at 7 a.m.[4] And the Employer made no attempt, after the strike's cancellation, to reiterate to employees that they were still expected to arrive at work by 7 a.m. Indeed, the fact that many employees arrived just minutes after 7 a.m. and throughout the day indicates that they did not have the intent to engage in a work stoppage. The Employer was fully aware of this.[5] Thus, the discharged employees cannot be deemed to have been on strike because they had no intent to withhold their labor.[6]

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[3] New York State Nurses' Ass'n, 334 NLRB 798, 800 (2001); Empire Steel Mfg., 234 NLRB 530, 532 (1978), enf. 605 F.2d 562 (9th Cir. 1979).

[4] One certified assistant nurse informed her administrator that the Union had told her and other employees to arrive at work at their normal shift time.

[5] For example, Director of Operations [*FOIA Exemptions 6 and 7(c)*] stated [*FOIA Exemptions 6 and 7(c)*] that the Union either told employees not to arrive at 7 a.m. or to show up at the wrong time, indicating that she knew employees were confused as to when to report to work.

[6] The Employer's reliance on Sociedad Espanola de Auxilio, 342 NLRB No. 40, slip op. at 3-5 (2004) is misplaced. There, the union gave adequate notice of two two-day strikes to take place a week apart during the holiday season. The union then canceled the first two-day strike, but the employer still locked out the employees for the entire ten day period between the two schedules strikes. The employer claimed that it was not sure whether employees would still strike on the first or second occasion and that it was difficult to find workers during the holiday season. The

Because the employees were not on strike, the Employer violated Section 8(a)(1) and (3) by discharging them for purportedly engaging in an unlawful strike. The Employer has provided no other reason for their discharge, and, in its discharge letter to employees, stated that if the NLRB determines that the employees' status was protected, they should be reinstated as positions become available. Thus, the Employer has conceded that it would not have terminated employees but for engaging in an allegedly unlawful strike.[7] Because there was no strike, the employees never lost their employee status, and the Employer violated Section 8(a)(1) and (3) by terminating them.

2. The Union provided adequate 10-day strike notice.

Ten day strike notice is required if a labor organization is going to, inter alia, engage in a strike. Here, there was no strike. There is nothing in the statute or the legislative history that indicates that a union violates Section 8(g) by providing a defective notice where it does not engage in a strike, picketing, or other concerted refusal to work. In any event, the Union here did not provide defective notice.

In calculating time under the initial notice provisions of Section 8(g), the Board counts the number of days and not the number of hours before the scheduled onset of activity.[8] In Devon Gables, the employer received the union's notice on October 28 via certified mail, informing the employer of picketing to commence on November 6 at 8 a.m. The Board, relying on the Ohio Oil test enunciated in the Section 8(d) 60-day notice context, counted the day of receipt as the first day and the day before the onset of activity as the last day. The Board concluded that the union had provided only nine days written notice (counting October 28 through

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Board held that the employer did not violate Section 8(a)(3) because it had legitimate operational concerns and was not acting discriminatorily. By contrast, the Employer here did not lock out employees for a limited period of time to ensure coverage on May 24, but fired employees based on its assertion that they had not complied with Section 8(g).

[7] The Employer, for instance, has not argued that employees would have been disciplined or terminated for arriving to work late or for insubordination.

[8] See Retail Clerks Union Local 727 (Devon Gables Health Care Center, Inc.), 244 NLRB 586, 587 (1979); Ohio Oil Co., 91 NLRB 759, 761 (1950) (Section 8(d) context).

November 5), rather than 10 days. Accordingly, the notice was found to be deficient.[9]

Here, the Union faxed notices on June 14 for a strike to take place on the morning of June 24. Using the test set forth in Devon Gables, this constituted 10 days notice, counting June 14 through June 23. The Employer argues that the strike notice was 6.5 hours short because the notice was sent around 1:30 p.m. for a strike to begin at 7 a.m. The Board in Devon Gables, however, calculated notice in days, not hours. In Devon Gables, notice was sent by certified mail, which does not normally arrive early in the morning, and the picketing began at 8 a.m. nine days later. The Board found that the union's notice was one day short, not 30 hours short. Under the Devon Gables test, the Union provided sufficient Section 8(g) strike notice here.[10]

The Employer's reliance on Alexandria Clinic,[11] is misplaced. There, a union gave notice of a strike to begin at 8 a.m. on a certain date more than 10 days in the future, but then delayed the strike by four hours without any notice to the employer.[12] The Board held that the union violated Section 8(g) by delaying the start of the strike after the time set forth in the union's 10-day notice without the employer's written agreement. The Board relied on the plain language of the last sentence of Section 8(g), which states that 10-day "notice, once given, may be extended by the written agreement of both parties." Based on this text, the Board held, a written agreement was the only way to extend notice, and a union could not unilaterally extend the commencement time of a strike.[13] The Board also relied on

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[9] Devon Gables, 244 NLRB at 587; see Monongahela Valley Association, Case 6-CG-9, Advice Memorandum dated December 30, 1977 (using date of receipt test, where employer received notice at 8:45 a.m. on November 4 of strike to take place at 6 a.m. on November 14, 8(g) notice was adequate because it was 10 days); Correctional Medical Services, 3-CG-43, Advice Memorandum dated December 23, 2002 (also applying date of receipt test).

[10] Because the Board calculates notice in days, not hours, it is unnecessary to argue that the 6.5 hour differential was de minimis.

[11] 339 NLRB 1262 (2003), enf. Minnesota Licensed Practical Nurses Ass'n v. N.L.R.B., 406 F.3d 1020 (8th Cir. 2005).

[12] Id. at 1262-63.

[13] Id. at 1263.

policy considerations, noting that the unilateral extension of a strike notice had the potential to disrupt and jeopardize patient care, forcing health care institutions to "'play a guessing game with respect to the welfare of its patients'" that was "completely at odds with the statutory objective."[14]

The Board's analysis in Alexandria Clinic is not applicable here. Indeed, in Alexandria Clinic, the Board cited Devon Gables with approval for providing a "literal" interpretation of the first sentence of Section 8(g), which requires ten days of advance notice. Moreover, the policy concerns articulated in Alexandria Clinic are not applicable here, as the Union's 10-day notice set a time certain for commencement of the strike and there was no element of surprise and no "guessing game" as to when the strike would have actually begun.

Thus, the Employer's conduct in discharging the employees for engaging in a purportedly unlawful strike violated Section 8(a)(1) and (3).

3. The unlawful discharges do not excuse the Union's failure to give proper notice of its June 28 picketing.

We further conclude that the unlawful discharges should not excuse the Union's failure to provide timely Section 8(g) notice of its intent to picket the Employer beginning on June 28 in protest of those discharges. The Union concedes that it provided no notice.

Under extant Board law, the Union would be excused from complying with the 10-day notice requirements of Section 8(g) because the picketing was in response to the Employer's serious unfair labor practices.[15] Serious unfair labor practices include conduct such as discharging employees.[16]

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[14] Id. at 1266, quoting California Nurses Association (City of Hope), 315 NLRB 468 (1994) (new 10-day notice required after union resumes picketing after 3-week hiatus).

[15] See Mastro Plastics Corp. v. NLRB, 350 U.S. at 278, 285-289 (discussing exception to 8(d) notice requirements).

[16] See Cincinnati Penthouse Club, Inc., 168 NLRB 969, 974 (1967), citing Ford Motor Co. (Sterling Plant), 131 NLRB 1462, 1490 (1961) (discharge of employee for engaging in a concerted protest over working conditions "among the most serious and fundamental unfair labor practices prescribed by the Act").

In Council's Center for Problems of Living,[17] for instance, the Board found that Section 8(g) notice was not required under Mastro Plastics where the Employer disciplined and discharged employees for attending a union meeting and engaging in an alleged work stoppage.[18] The ALJ relied on the legislative history of the 1974 Health Care Amendments, which provide that "a labor organization will not be required to serve a ten day notice or to wait until the expiration of the ten day notice when the employer has committed unfair labor practices as in Mastro Plastics."[19] Here, if the Board finds that the Employer violated Section 8(a)(1) and (3) by discharging employees for failing to arrive at work by 7 a.m., the Board would likely find that discharging nearly half the workforce for engaging in a lawful strike constituted sufficiently serious unfair labor practices to excuse the Union from providing notice of its intent to picket under Mastro Plastics.

However, the Second Circuit in NLRB v. Washington Heights-West Harlem-Inwood Mental Health Council, Inc. denied enforcement of the Board's decision in Council's Center and, in dicta, disagreed with the Board's application of Mastro Plastics to Section 8(g). The court was hesitant to give effect to the Health Care Amendment's legislative history because that history "not so much guides interpretation of ambiguous wording in the statute, but rather creates a significant exception."[20] The court also noted that, whereas Section 8(d) was designed to equalize bargaining power during collective bargaining negotiations by preventing "quickie strikes," the Section 8(g) notice protects the interests of health care institution patients "for whom an unanticipated work stoppage may be a life-or-death matter."[21]

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[17] 289 NLRB 1122 (1988), enf. denied 897 F.2d 1238, 1247-48 (2d Cir. 1990).

[18] See id. at 1122 fn.3, and ALJ discussion at 1146-1148 (union failed to give employer any notice of one-day delay in commencing strike from date and time set forth in the original 10-day notice).

[19] Id. at 1147.

[20] 897 F.2d at 1247.

[21] Id. at 1248. [*FOIA Exemption 5*

The Board has not yet responded to the serious legal and policy concerns which, although dicta in the case where they were raised, constituted a pointed criticism of the Board's approach. Therefore, the General Counsel intends to place before the Board the issue raised by the conflict between the Board's application of the Mastro Plastics exception to Section 8(g) in Council's Center and other cases, and the Second Circuit's disagreement with that application.[22]

[*FOIA Exemption 5*

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In conclusion, the Region should: (1) absent withdrawal, dismiss the Section 8(g) charge as to the Union's failure to provide 10-day notice of its intent to strike on June 24; (2) absent settlement, issue complaint on the Section 8(a)(1) and (3) charges as to the discharge of employees for failing to arrive at work on June 24 by 7 a.m.; and [*FOIA Exemption 5*

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[22] The Employer may assert, in defense of the Section 8(a)(3) allegations, that it would have lawfully discharged the picketers for the June 28 picketing had it not already discharged them for the alleged strike. Such an argument would be without merit because under the plain language of Section 8(d) and the legislative history of Section 8(g), only strikers, not picketers, lose their employee status under Section 8(d) for failing to provide proper 8(g) notice. See Correctional Medical Services, Case 3-CG-43, Advice Memorandum dated December 23, 2003; National Lutheran Home for the Aged, Case 5-CA-29759, Advice Memorandum dated November 6, 2001. Thus, even if the Union violated Section 8(g) by failing to provide notice of the picketing, the Employer would not have been justified in discharging picketers for this reason.

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B.J.K.